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IN THE

Supreme Court of the United States

October Term, 1961

No. 957

ROBERT SOBLEN

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

and

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Doctors Bernard Diamond, Max Pepper, Walter Bonime, Harry Klein, Wagner H. Bridger Joseph Wortis and Henry B. Richardson respectfully move this Court for leave to file the accompanying brief in this case as amici curiae. Consent of the attorney for the petitioner herein has been obtained, but the Solicitor General of the United States has refused to consent.

The applicants are psychiatrists. One of them, Dr. Bernard Diamond, is Chairman of the Committee on Law and Psychiatry of the American Psychiatric Association (although he does not purport to speak for that organization). The applicants have an interest in this case in that the issues herein involve mixed questions of law and psychiatry.

The case presents two basic questions of general importance, over and above the merits of the case itself: One, whether a person physically and mentally incapacitated (as was the petitioner herein) should be required to stand trial, especially in a capital case; and, second, whether a conviction should be permitted on the testimony of an individual who is admittedly a psychotic, as was the chief witness against petitioner. Reference to the details of this case is necessitated simply to establish that the points urged are actually presented herein.

The first of these legal-psychiatric questions grows out of facts which can be simply stated. Petitioner was found guilty by a jury in the Southern District of New York on a charge of espionage; he was sentenced to life imprisonment. Petitioner was forced to stand trial even though he was suffering from the dread disease of leukemia. He had, according to the Government's own medical expert, about a year to live. Petitioner's mental processes were so severely retarded by pain-killing and sleep-inducing sedation that he frequently fell asleep throughout the trial; when awake, he was in a somnolent state. These facts are elaborated in the proposed amici brief submitted herewith.

The remaining question also involves a mixture of law and psychiatry. The principal prosecution witness was the brother of petitioner. That witness was found, by a Government psychiatrist, to be in an aggravated state of psychosis, and not able to separate fantasy from reality. To recognize the fantasies of such a psychotic calls upon the highest skills of the science of psychiatry. Nevertheless, the trial judge left it to the twelve laymen, who constituted the jury below, to attempt to separate the truthful from the hallucinatory in the testimony of the psychotic witness.

The reason for apprehending that existing counsel in this cause may not adequately present the issues here suggested is that the questions lie on the boundary line between law and psychiatry. It is the conviction of the psychiatrists that a collaboration between the profession of law and that of psychiatry is necessary to achieve a result which is soundly rooted. It is the hope of psychiatrists submitting the amici brief that their contribution may assist this Court in coming to correct conclusions on issues of the first magnitude in the criminal law.

WHEREFORE, it is respectfully prayed that an order be made herein permitting the submission of the annexed amici brief.

Dated: May 29, 1962.

Respectfully submitted,

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The undersigned, practicing psychiatrists, who are vitally concerned with the interrelationship of law and psychiatry, wish to raise certain questions which arise in the case of the *United States* v. *Soblen* as they pertain to our shared concern.

The conviction of Dr. Robert Soblen, and his sentence to life imprisonment, raises, from a psychiatric point of view, two questions:

(1) Whether Dr. Soblen, a 61-year-old physician, fatally ill (in advanced state of lymphatic leukemia), was able to stand trial; and

(2) The conviction was based upon the testimony of Dr. Soblen's younger brother, Jack Soble, who was suffering from involutional psychosis and chronic brain syndrome. This raises the question whether the Government should be permitted to offer this type of testimony in a criminal case.

A. The first question with which we are concerned is whether the defendant's, Dr. Soblen's, physical condition and mental state at the time of the trial were such that he could both stand trial and participate with understanding in his own defense.

Dr. Soblen has been suffering from lymphatic leukemia since 1958 (commonly known as cancer of the blood) and was at the time of the trial already in the advanced stage.[1] When the case was reached for trial, Dr. Soblen's condition had deteriorated and he could not function in the courtroom without having heavy sedation and the administration of other drugs. Sedatives administered included demerol, thorazine, other tranquilisers and other analgesics. He was also on cortisone preparations both before and during the trial.

By the very nature of that form of leukemia, Dr. Soblen would have been frequently in great pain throughout the trial due to pressure of the enlarged spleen and enlarged liver. This made it frequently difficult for him to sit. Toward the end of the trial his condition worsened to such a degree that it was necessary for him to lie on a couch in the courtroom which he did by leave of court. He was in a sleepy state during a great part of the trial and was fre-

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[1] Dr. Peter Vogel, the Government physician stated on pre-trial that the life expectancy of the defendant was somewhat over one year.

quently, even when awake, unable to follow the trial proceeding.

From the above description of the defendant and from existing knowledge of the deteriorating process of lym-

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2 Mr. Brill: Your Honor, may I state for the record that the defendant now and then lapses into a sense of sleep, and that is because of his physical condition that your Honor is aware of. I just want the record to show that, and I want the jurors to be made aware that it is not out of disrespect to the Court or the jury. He does fall asleep now and then because of his illness, your Honor.

The Court: Well, I don't know why he fell asleep—

Mr. Brill: Your Honor, it is because of the serious illness that your Honor knows about that he suffers from.

The Court: Up to this point he participated in the discussion with counsel.

Mr. Brill: Yes, but he has lapsed into sleep, lapsed into sleep, your Honor, on several occasions. Counsel has just called it to my attention. He tried to nudge him and it was difficult to awake him.

The Defendant: I am sorry.

The Court: Do you want a recess now?

Mr. Brill: No. I want the jurors to know that when he does lapse into sleep that he is not being disrespectful either to the Court or the jury.

The Court: I know there is no disrespect intended on the part of anybody. I know he had his eyes closed. Whether he was asleep, I don't know. He is up now, anyway.

Mr. Brill: Yes, your Honor.

The Court: In the sense that his eyes are open.

Mr. Brill: During the course of the trial I may have to move and object, and make it a matter of record, your Honor.

The Court: All right. I will rely on the vigilance of counsel to see to it that somnolence does not interfere with the trial, and we will see to it that nobody falls asleep.

Mr. Brill: I am not interested in others; I am only interested in the rights of this defendant, your Honor, and preserving the record.

The Court: The record is preserved.

Mr. Brill: Thank you.

The Court: All right, proceed.

phatic leukemia, there is serious question as to the defendant's mental competency either to be tried or to participate adequately in his own defense. Medical evidence in cases of advanced lympathic leukemia demonstrates damage to brain tissue with concomitant damage to brain function.

Similarly, a patient under daily sedation and treated simultaneously with cortisone preparations and analgesics experiences reduced perception, with consequent impairment of normal intellectual functioning. It is to be expected that the defendant would be in a drowsy and sleepy state throughout the trial.

Both the deteriorating effects of the progressive leukemia on the brain functioning and the retarding impact of sedation, analgesics and other medication taken throughout the trial lead us to the conclusion that it would tend to make it difficult for defendant to follow the trial and reduce his acuity and his mental clarity to a point where he is unable to exercise the judgment required by the exigencies of such a trial. Especially in view of the gravity of, and the tensions inherent in, the grave accusations and the overhanging threat of capital punishment, defendant would have to be mentally alert to follow the evidence offered against him, and to be of assistance to his counsel. This is the more true since the prosecution testimony ranged over a period of 40 years.

The mental ability of defendant was wholly inadequate to meet the extraordinary demands which such a trial placed upon him. As examples, the trial placed upon defendant the necessity to follow the intricacies of the prosecution's evidence in order to enable defendant to assist his counsel to prepare his cross-examination.

Finally, and most important, was the necessity of defendant consulting with his counsel, on the critical question of whether or not the defendant should take the stand in his own behalf.[3] A somniferous patient is obviously unable to take such a judgment or to assist counsel to make such judgment under the conditions here depicted.

Under the circumstances, we feel that defendant was deprived of his day in court. While he was physically present, albeit in a horizontal posture, his state of mind, induced by required sedation, made him mentally absent. This would be so even in an ordinary case; it is much more true in a case involving the dramatic tensions of brother testifying against brother, of testimony covering a span of 40 years, and of circumstances which demanded a mind most alert, perceptive and vigilant.

B. The second question with which we are concerned is the reliability of the testimony of the chief witness for the Government, Jack Soble, the brother of the defendant.

Jack Soble has a long psychiatric history. We are informed that, according to record data, the behavior pattern and mental functioning of the complainant embody the following characteristics:

1. Severe and lasting depression which by 1957 attained psychotic proportion.

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[3] The Trial Court refused at the close of the People's case to grant Petitioner, who was not then in a mental and physical condition to make a decision, an over-night adjournment to decide whether he should testify in his own behalf.

2. Two suicide attempts in 1957 and 1958, one of them grotesque in nature, the witness swallowing a huge quantity of nuts and bolts.

3. Twenty electroshock treatments administered to him on separate occasions, in 1958 and 1959.

4. His irritable and hostile behavior during the trial of his brother, for which he had to be reprimanded and kept in control by the trial judge.

Dr. Donald Rinsley, a Government psychiatrist and a member of the staff of the Psychiatric Division of the Federal Prison at Springfield, Missouri, studied the complainant, Jack Soble, from April to June 1958, seeing him every other day. The Psychiatric Division's final diagnosis (as reported during the *Zborowsky* trial in 1959, wherein Jack Soble was a principal witness) is as follows:

> "The diagnosis that we made is called involutional psychotic reaction in partial remission and what we call chronic brain syndrome."
>
> * * * * * *
>
> "Jack Soble has in essence two illnesses—one is a severe depression and the other is an organic brain disease itself which we could ascribe to impairment or damage of his higher brain functions."

Dr. Rinsley further stated that the witness' illness was "of moderate to severe degree", and that on a scale of zero to ten (ten representing the worst), he would place Jack Soble between seven and eight.

With regard to the credence which should be given to this chief prosecution witness, Dr. Rinsley referred to the fact, not an uncommon concomitant of this type of mental con-

dition, that it was difficult to say where reality left off and fantasy began. In this Government psychiatrist's own words:

> "One of Jack Soble's difficulties has been difficulty with memory and one could expect that at times because of a deficiency in memory and because of the nature of his mental illness he is capable of filling in his gaps in memory with information which he believes to be true but which may not be true."

The condition above described may very well have been aggravated by the fact of intense sibling rivalry of Jack Soble, the younger brother, toward his elder sibling, defendant here. In these circumstances, the giving of testimony by an acknowledged psychotic against a brother, has peculiar and added significance.

CONCLUSIONS

1. Because of defendant's physical condition and accompanying mental state, defendant suffered impairment of his mental functioning to such an extent that he was in no condition to assume the necessary responsibility for participation in his defense;

2. A conviction carrying with it a sentence of life imprisonment should not be allowed to rest on the testimony of a brother whose mental condition has been described by a federal prison psychiatrist as involutional psychotic reaction and chronic brain syndrome. The veracity, ac-

curacy and validity of testimony from this source are open to very serious question.

Dated: May 29, 1962.

Respectfully submitted,

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